

APPEAL NO. 041540
FILED AUGUST 17, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 2, 2004. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the sixth quarter, January 21 through April 20, 2004. The claimant appealed, disputing the determination of nonentitlement. The appeal file does not contain a response from the respondent (carrier).

DECISION

Affirmed.

The claimant attached documents to her appeal, some of which were not admitted into evidence at the hearing. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. See *generally* Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. See Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. Upon our review, we cannot agree that the evidence meets the requirements of newly discovered evidence, in that the claimant did not show that the new evidence submitted for the first time on appeal could not have been obtained prior to the hearing or that its inclusion in the record would probably result in a different decision. The evidence, therefore, does not meet the standard for newly discovered evidence and will not be considered.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The parties stipulated that the qualifying period for the sixth quarter began on October 9, 2003, and ended on January 7, 2004; that the claimant had a 24% impairment rating; that the claimant's preinjury average weekly wage was \$414.28; and that impairment income benefits were not commuted. The claimant expresses disagreement with some of the stipulations recited in the decision and order. Section 410.166 provides that an oral stipulation or agreement of the parties that is preserved in the record is final and binding.

The claimant has the burden of proving entitlement to SIBs for any quarter claimed. In the present case, the hearing officer found that the claimant failed to prove the requirement that her underemployment and unemployment during the qualifying

period was a direct result of the impairment resulting from the compensable injury. Whether a claimant satisfied the direct result requirement for SIBs entitlement is a factual question for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. The record reflects a difference of medical opinion on the claimant's ability to work. In a report dated July 17, 2003, Dr. B, a carrier selected doctor, opined that "as of September 3, 2003, restrictions should be removed and [the claimant] should return to gainful employment of her own choosing." A Work Status Report (TWCC-73) was in evidence which indicated the claimant was returned to work without restrictions on September 3, 2003, shortly before the beginning of the qualifying period at issue. The hearing officer was acting within his province as fact finder in determining that the claimant failed to establish she has sustained a serious injury with lasting effects which prevents her from returning to her previous employment. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). As an appellate tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The evidence was conflicting and applying the standard of review stated above, we find no legal basis to overturn the decision of the hearing officer.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **MARYLAND CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**LEE F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Margaret L. Turner
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. The hearing officer states as the basis for his decision, in the Background Information, "Claimant is shown to be suffering from degenerative problems in her neck which are ordinary diseases of life, not related to her original injury." The designated doctor's impairment certification, however, shows that these so-called "degenerative problems in her neck which are ordinary diseases of life" were rated as part of the impairment from the compensable injury. Therefore, I believe the evidence shows, with regard to this qualifying period, that the claimant's underemployment was a direct result of the impairment from the compensable injury. Accordingly, I would reverse and render that the claimant is entitled to sixth quarter SIBs.

Edward Vilano
Appeals Judge